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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

JAVIER MERIN,

Defendant and Appellant.

G051881

(Super. Ct. No. 13HF0219)

O P I N I O N

Appeal from a postjudgment order of the Superior Court of Orange County,
Thomas A. Glazier, Judge. Reversed and remanded with directions.

Jennifer Peabody, under appointment by the Court of Appeal, for
Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney
General, Marvin Mizell and Stacy Tyler, Deputy Attorneys General, for Plaintiff and
Respondent.

Appellant Javier Merin contends the trial court erred in finding he was ineligible for resentencing on the basis his conviction for commercial burglary does not meet the definition of shoplifting under Proposition 47. We agree the court erred in that regard. Therefore, we reverse the court's decision and remand the case for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant was charged in a felony complaint with committing second degree commercial burglary in violation of Penal Code sections 459 and 460, subdivision (b).¹ At his preliminary hearing, the evidence established that on September 13, 2012, appellant entered a Costa Mesa motel and used a stolen credit card to obtain a \$64 room. The next day, appellant tried to extend his stay at the motel for another night, but the credit cards he tendered were declined, so he vacated the premises.

In November 2013, appellant pleaded guilty to the burglary charge and was sentenced to three years in prison. The factual basis for his plea states appellant "unlawfully entered a commercial building with the intent to commit larceny."

Following the passage of Proposition 47 in the fall of 2014, appellant petitioned the trial court to recall his sentence and resentence him to a misdemeanor. Appellant argued resentencing was warranted because his burglary conviction was based on conduct that amounted to misdemeanor shoplifting under Proposition 47. However, the trial court disagreed and denied his petition.

DISCUSSION

Appellant contends the trial court erred in finding he was ineligible for resentencing. We agree.

"Proposition 47 makes certain drug- and theft-related offenses misdemeanors, unless the offenses were committed by certain ineligible defendants.

¹ All further statutory references are to the Penal Code.

These offenses had previously been designated as either felonies or wobblers (crimes that can be punished as either felonies or misdemeanors).’ [Citation.]” (*People v. Morales* (June 16, 2016, S228030) __ Cal.4th __, __ [2016 DJDAR 5857].)

“Proposition 47 also added section 1170.18, concerning persons currently serving a sentence for a conviction of a crime that the proposition reduced to a misdemeanor. It permits such a person to ‘petition for a recall of sentence before the trial court that entered the judgment of conviction in his or her case to request resentencing in accordance with’ specified sections that ‘have been amended or added by this act.’ (§ 1170.18, subd. (a).) If the trial court finds that the person meets the criteria [for resentencing], it must recall the sentence and resentence the person to a misdemeanor, ‘unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety.’ (§ 1170.18, subd. (b).)” (*People v. Morales, supra*, __ Cal.4th at p. __.)

Among the sections added by Proposition 47 is section 459.5, which created the crime of shoplifting. The crime is defined as “entering a commercial establishment with intent to commit larceny while that establishment is open during regular business hours, where the value of the property that is taken or intended to be taken does not exceed nine hundred fifty dollars (\$950).” (§ 459.5, subd. (a).) Except in certain circumstances not applicable here, shoplifting “shall be punished as a misdemeanor.” (*Ibid.*)

Here, it is undisputed that in committing burglary in 2012, appellant entered a commercial establishment and fraudulently obtained a motel room with a rental value of less than \$950. The only issue is whether this fraudulent procurement constituted “larceny” within the meaning of section 459.5.

Relying on *People v. Gonzales* (2015) 242 Cal.App.4th 35 (*Gonzales*), respondent argues that, as used in section 459.5, larceny requires a taking and carrying away of property without the owner's consent. If that's the case, appellant's burglary did not constitute larceny because he did not commit a trespassory taking. Rather, he acquired a motel room with the owner's consent, albeit under false pretenses. Respondent's argument fails for two reasons.

First, while this appeal was pending, the California Supreme Court granted review of *Gonzales* (S231171), and thus that case has no precedential value. (Cal. Rules of Court, rules 8.1105(e)(1), 8.1115(a).) Second, and more importantly, *Gonzales* derived its definition of larceny based on the Supreme Court's decision in *People v. Williams* (2013) 57 Cal.4th 776 (*Williams*), which defined larceny for purposes of the crime of robbery, not burglary. Robbery is different from other theft crimes in that it requires a trespassory taking, meaning a taking and carrying away of property without the owner's consent. (*Id.* at pp. 787-788.)

As illustrated in *People v. Smith* (2016) 247 Cal.App.4th 717 (*Smith*), this distinction is important for purposes of ascertaining the meaning of the term larceny in section 459.5. In *Smith*, the defendant argued his conduct in presenting counterfeit bills at a check cashing business, for which he was convicted of burglary, constituted shoplifting under section 459.5. Although the defendant's actions did not constitute larceny under *Williams*' interpretation of that term, the *Smith* court found *Williams* inapt on the basis it involved the crime of robbery, which does not even mention the term larceny. (*Smith, supra*, 247 Cal.App.4th at p. ___, fn. 5; § 211.)

Instead of incorporating *Williams*' definition of larceny into the shoplifting statute, ala *Gonzales*, the *Smith* court looked to how the term larceny has been interpreted in the context of the crime of burglary, which is defined as entering a house or other

specified building “with intent to commit grand or petit larceny or any felony[.]” (§ 459.) *Smith* reasoned, “Our Supreme Court has held ‘[a]n intent to commit theft by a false pretense or a false promise without the intent to perform will support a burglary conviction.’ (*People v. Parson* (2008) 44 Cal.4th 332, 354.) Voters adopted the phrase ‘intent to commit larceny’ in section 459.5, which mirrors the intent element in the general burglary statute. (§ 459.) Because the voters intended section 459.5 to include theft by false pretenses, entering a check cashing establishment and passing counterfeit bills or notes qualifies as shoplifting under section 459.5.” (*Smith, supra*, 247 Cal.App.4th at p. ____.) In other words, *Smith* held “larceny as the term appears in section 459.5, subdivision (a) includes theft by false pretenses and does not require a trespassory taking.” (*Id.* at p. ____.)

We agree with *Smith*. It is immaterial that appellant’s burglary did not involve a trespassory taking or that, as respondent points out, the crime of burglary is not expressly listed in Proposition 47. The fact appellant’s burglary conviction was premised on an entry with the intent to commit theft by false pretenses is sufficient to render him eligible for resentencing under section 459.5. This conclusion is fully consistent with the voters’ intent to ensure that prison spending is focused on violent criminals, as opposed people like appellant, who was convicted for fraudulently obtaining one night’s use of a \$64 motel room. (See *In re J.L., supra*, 242 Cal.App.4th at p. 1111.)

DISPOSITION

The trial court’s order denying appellant’s Proposition 47 petition is reversed. The matter is remanded for the court to determine whether resentencing

appellant would pose an unreasonable risk to public safety within the meaning of section 1170.18, subdivision (b).

BEDSWORTH, J.

WE CONCUR:

O'LEARY, P. J.

FYBEL, J.